Azman bin Teh (trading in the name and style of Perunding Trussmaju) v Chong Shao Fen & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)(NCvC)-91–11 OF 2023
AZMAN ABDULLAH, AHMAD FAIRUZ AND LIM HOCK LENG JJCA
20 AUGUST 2025

Civil Procedure — Damages — Appeal against — Demolition/construction works — Failure to take preventive measures to prevent damages to neighbouring bungalow — Whether awards of loss of rental/loss of use of bungalow, repair and rectification of bungalow and aggravated and/or exemplary damages reasonable

The respondents' ('plaintiffs') bungalow was damaged by demolition/construction works carried out by their neighbours ('the first and second defendants') in 2009. Therefore, they sued the first and second defendants and their architect, contractor, and consultant engineer ('the third, fourth and fifth defendants') for negligence. The High Court judge Nik Hasmat bt Nik Mohamad J ('the HCJ') allowed the plaintiffs' claim for reassessment of damages against the fifth defendant ('appellant'), namely, for: (a) loss of rental/loss of use of the bungalow in the sum of RM2,171,57 ('first head of damages'); (b) repair and rectification of the bungalow in the sum of RM1,171,012 ('second head of damages'); and (c) aggravated and/or exemplary damages in the sum of RM300,000 ('third head of damages'). Hence, the present appeal by the appellant. In regard to the first head of damages, the appellant pointed out that it was the plaintiffs' pleaded case that due to the structural instability caused to their bungalow, they had moved out to the second plaintiff's apartment in Bandar Bukitraya till the bungalow could be made inhabitable. Hence, it was argued that the plaintiffs were bound by their pleading that their loss of rental was for the apartment instead of the bungalow. For the second head of damages, the thrust of the appellant's contention regarding was that since the reliefs sought by the plaintiffs in respect of the repair and rectification works were granted by the previous trial judge and subsequently the said remedial works had already been duly carried out, no further claim for the same repair and rectification works should be allowed as that would result in double claim. Finally, in respect of the third head of damages, it was argued that the amount awarded was not justified and manifestly excessive prior.

Held, dismissing the appeal with costs:

(1) The HCJ was not plainly wrong when she held: 'despite not specifically pleaded in the plaintiffs' statement of claim, the plaintiffs' claim for loss of rental is allowed under general damages which does not require its specific pleading. The plaintiffs' rental loss following the loss of use of the bungalow is clearly not special damages but instead constitutes general damages which cannot be pleaded in the statement of claim'. The loss of rental was used as a yardstick for the plaintiffs' loss of use of their bungalow from the time they moved out on 27 August 2009 till May 2020. In cases where a plaintiff had been wrongfully deprived of the use of property, the measure of damages would be actual proof of the loss of rental or a genuine reasonable estimate of the rental that the property might have fetched but for the wrongful action. As there was no actual rental paid, a notional rental had to be determined which would, as closely as possible, reflect the loss of use of the bungalow. Hence, the damages were correctly classified as general damages (see paras 29–33).

(2) The claim for loss of rental/loss of use of the bungalow could not have been ascertained with certainty. The plaintiffs, when the statement of claim was prepared, could not have pleaded losses which had yet to be incurred with mathematical precision, more so when the head of claim was over a certain time within the period 27 August 2009 till May 2020 when there were fluctuations. And, notably, a large part of the relevant period was after the filing of the action in 2011. As such, the loss and damages relating to the loss of use of the bungalow was such that 'the precise amount of item of damages' could not have become clear before the trial. Such loss and damage could not be classified as special damages. It was thus the quantum of damages for loss of rental/loss of use in the sum of RM2,171,570 (with some variables) was assessed against the fifth defendant who would be accountable for 30% of the sum as per the apportionment of liability (see paras 35–36 & 38).

(3) In respect of any prejudice that may accrue to the appellant on account of the plaintiffs' pleaded case, it was significant that the plaintiff had abandoned their claim for loss of rental for the apartment in Bandar Bukitraya and adduced no evidence relating to that head of claim. There was thus no issue of overlapping claims. The plaintiffs were hence entitled to pursue their claim in general damages. Further, the appellant could not be said to be prejudiced or to have been taken by surprise, given the witness statements and reports made available before the trial/assessment/reassessment (see paras 39–41).

(4) There was no merit in the appellant's contention that the HCJ could not assess and award damages for loss of rental/use of the bungalow. Here, the bungalow had become uninhabitable. It was no longer safe to stay there. The plaintiffs were not in a position to elect between the option of occupying the bungalow while carrying out repair and rectification works

or selling the bungalow and claiming the diminution in value since it was unsafe for inhabitation. There was no failure to mitigate as the tortfeasors failed to carry out the works ordered by the original trial judge (see paras 42 & 44).

(5) The basis of the claims was justified and there were no overlapping or double claims. A perusal of the geotechnical inspection report prepared by Ir Dr Gue See Sew ('PW3') in January 2020 showed that, moving forward, there were repair and rectification works which have yet to be carried out. It was clear from the evidence that the cause of the problems was due the negligence of the appellants, and not due to the pre-existing lack of maintenance of the bungalow. Hence, there was no double claim, and the HCJ could not be said to have been plainly wrong in assessing repair and rectification works in the sum of RM1,171,012 which was amply supported by evidence (see paras 47 & 52–53).

(6) As noted by the HCJ, during that three-month period, 'no step was taken by the defendants to prevent the collapse of the boundary wall, not even the piling of sheet piles on the wall'. Aggravated/exemplary damages of RM300,000 were thus awarded on account of the reckless and gross negligence of the appellants. The quantum was justified and not manifestly excessive such that appellate intervention was warranted. Therefore, the decision and awards of damages by the HCJ in the reassessment of damages exercise were affirmed (paras 55–57 & 60).

[Bahasa Malaysia summary

Banglo milik pihak responden-responden ('plaintif-plaintif') telah mengalami kerosakan akibat kerja-kerja perobohan/pembinaan yang dijalankan oleh jiran mereka ('defendan pertama dan kedua') pada tahun 2009. Justeru, pihak responden telah memfailkan tindakan undang-undang terhadap defendan pertama dan kedua serta arkitek, kontraktor dan jurutera perunding mereka ('defendan ketiga, keempat dan kelima') atas alasan kecuaian. Hakim Mahkamah Tinggi, Nik Hasmat bt Nik Mohamad H ('HMT'), telah membenarkan tuntutan plaintif-plaintif bagi penilaian semula ganti rugi terhadap defendan kelima ('perayu'), iaitu bagi: (a) kehilangan sewaan/kehilangan penggunaan banglo tersebut berjumlah RM2,171,570 ('kepala ganti rugi pertama'); (b) kerja-kerja pembaikan dan pemulihan banglo tersebut berjumlah RM1,171,012 ('tajuk ganti rugi kedua'); dan (c) ganti rugi teruk dan/atau teladan berjumlah RM300,000 ('tajuk ganti rugi ketiga'). Dengan itu, rayuan ini dikemukakan oleh perayu. Berhubung dengan tajuk ganti rugi pertama, perayu menyatakan bahawa berdasarkan kes yang dipohonkan oleh plaintif-plaintif, ketidakstabilan struktur yang dialami oleh banglo mereka telah menyebabkan plaintif-plaintif telah berpindah keluar dan menetap di pangsapuri milik plaintif kedua di Bandar Bukitraya sehingga banglo tersebut dapat didiami semula. Justeru, telah dihujahkan bahawa plaintif-plaintif terikat dengan pernyataan tuntutan mereka bahawa

kehilangan sewaan yang dialami adalah berkaitan dengan pangsapuri tersebut dan bukannya banglo. Berhubung dengan tajuk ganti rugi kedua, inti pati hujahan perayu adalah bahawa memandangkan remedi yang dituntut oleh plaintif-plaintif berhubung kerja-kerja pembaikan dan pembetulan telah dibenarkan oleh hakim perbicaraan terdahulu dan seterusnya kerja-kerja pemulihan tersebut telah pun dilaksanakan sepenuhnya, maka tiada tuntutan lanjut bagi kerja-kerja pembaikan dan pemulihan yang sama seharusnya dibenarkan kerana ia akan mengakibatkan tuntutan berganda. Akhir sekali, berhubung dengan tajuk ganti rugi ketiga, telah dihujahkan bahawa jumlah ganti rugi yang diberikan adalah tidak berjustifikasi dan nyata berlebihan.

Diputuskan, menolak rayuan dengan kos:

(1) HMT tidak tersilap secara nyata apabila beliau memutuskan bahawa: 'walaupun tidak dipohonkan secara khusus dalam pernyataan tuntutan plaintif-plaintif, tuntutan plaintif-plaintif bagi kehilangan sewaan adalah dibenarkan di bawah ganti rugi am yang tidak memerlukan pernyataan khusus. Kehilangan sewaan yang dialami oleh plaintif berikutan kehilangan penggunaan banglo tersebut jelas bukan ganti rugi khas tetapi sebaliknya merupakan ganti rugi am yang tidak perlu dipohonkan secara khusus dalam pernyataan tuntutan'. Kehilangan sewaan tersebut telah digunakan sebagai kayu ukur bagi kehilangan penggunaan banglo oleh plaintif-plaintif dari tarikh mereka berpindah keluar pada 27 Ogos 2009 sehingga Mei 2020. Dalam kes-kes di mana seorang plaintif telah dilucutkan secara salah daripada penggunaan hartanya, ukuran ganti rugi adalah sama ada bukti sebenar kehilangan sewaan atau suatu anggaran munasabah yang tulen terhadap sewaan yang berkemungkinan diperoleh oleh harta tersebut sekiranya tidak berlaku perbuatan salah berkenaan. Memandangkan tiada sewaan sebenar dibayar, sewaan konseptual perlu ditentukan yang, setakat yang boleh, mencerminkan kehilangan penggunaan banglo tersebut. Oleh itu, ganti rugi tersebut telah diklasifikasikan dengan betul sebagai ganti rugi am (lihat perenggan 29–33).

(2) Tuntutan bagi kehilangan sewaan/kehilangan penggunaan banglo tersebut tidak dapat ditentukan dengan kepastian. Pada masa pernyataan tuntutan disediakan, plaintif-plaintif tidak mungkin memohon kerugian yang masih belum dialami dengan ketepatan matematik, lebih-lebih lagi apabila tajuk tuntutan tersebut melibatkan suatu tempoh tertentu antara 27 Ogos 2009 hingga Mei 2020 yang tertakluk kepada turun naik. Tambahan pula, sebahagian besar tempoh yang berkaitan adalah selepas pemfailan tindakan ini pada tahun 2011. Oleh yang demikian, kerugian dan ganti rugi berkaitan kehilangan penggunaan banglo tersebut adalah sedemikian rupa sehingga 'jumlah tepat bagi item ganti rugi' tidak dapat dipastikan sebelum perbicaraan. Kerugian dan ganti rugi tersebut tidak boleh diklasifikasikan sebagai ganti rugi khas. Oleh itu, kuantum ganti

rugi bagi kehilangan sewaan/kehilangan penggunaan berjumlah RM2,171,570 (tertakluk kepada beberapa pembolehubah) telah dinilai terhadap defendan kelima, yang bertanggungan sebanyak 30% daripada jumlah tersebut selaras dengan pembahagian liabiliti (lihat perenggan 35–36 & 38).

(3) Berhubung dengan sebarang prejudis yang mungkin dialami oleh perayu akibat kes yang dipohonkan oleh plaintif-plaintif, adalah signifikan bahawa plaintif telah meninggalkan tuntutan mereka bagi kehilangan sewaan pangsapuri di Bandar Bukitraya dan tidak mengemukakan sebarang keterangan berkaitan kepala tuntutan tersebut. Oleh itu, tiada isu tuntutan bertindih timbul. Dengan yang demikian, plaintif berhak untuk meneruskan tuntutan mereka di bawah ganti rugi am. Selanjutnya, perayu tidak boleh dikatakan telah diprejudiskan atau dikejutkan, memandangkan pernyataan saksi dan laporan-laporan yang telah didedahkan sebelum perbicaraan/penilaian/penilaian semula (lihat perenggan 39–41).

(4) Tiada merit dalam hujahan perayu bahawa HMT tidak mempunyai bidang kuasa untuk menilai dan menganugerahkan ganti rugi bagi kehilangan sewaan/penggunaan banglo tersebut. Dalam kes ini, banglo berkenaan telah menjadi tidak boleh didiami. Ia tidak lagi selamat untuk diduduki. Plaintif-plaintif tidak berada dalam kedudukan untuk memilih antara opsyen menduduki banglo tersebut semasa kerja-kerja pembaikan dan pemulihan dijalankan atau menjual banglo tersebut dan menuntut pengurangan nilai, memandangkan banglo tersebut tidak selamat untuk didiami. Tiada kegagalan untuk mengurangkan kerugian kerana pihak pelaku tort gagal melaksanakan kerja-kerja yang telah diperintahkan oleh hakim perbicaraan asal (lihat perenggan 42 & 44).

(5) Asas tuntutan-tuntutan tersebut adalah wajar dan tiada tuntutan bertindih atau tuntutan berganda. Penelitian terhadap laporan pemeriksaan geoteknikal yang disediakan oleh Ir Dr Gue See Sew ('PW3') pada Januari 2020 menunjukkan bahawa, bagi masa hadapan, terdapat kerja-kerja pembaikan dan pemulihan yang masih belum dilaksanakan. Berdasarkan keterangan yang dikemukakan, adalah jelas bahawa punca permasalahan tersebut adalah disebabkan oleh kecuaian perayu, dan bukannya berpunca daripada kekurangan penyelenggaraan banglo tersebut yang telah wujud sebelum ini. Oleh yang demikian, tiada tuntutan berganda, dan HMT tidak boleh dikatakan telah tersilap secara nyata dalam menilai kos kerja-kerja pembaikan dan pemulihan berjumlah RM1,171,012 yang disokong sepenuhnya oleh keterangan (lihat perenggan 47 & 52–53).

(6) Sepertimana yang diperhatikan oleh HMT, sepanjang tempoh tiga bulan tersebut, 'tiada sebarang langkah telah diambil oleh defendan-defendan untuk menghalang keruntuhan tembok sempadan, malah tiada

pemasangan cerucuk kepingan (*sheet piles*) pada tembok tersebut'. Oleh yang demikian, ganti rugi teruk/teladan berjumlah RM300,000 telah diberikan berikutan kecuaian melulu dan kecuaian kasar pihak perayu. Kuantum tersebut adalah berjustifikasi dan tidak nyata berlebihan sehingga memerlukan campur tangan mahkamah rayuan. Oleh itu, keputusan dan award ganti rugi oleh HMT dalam pelaksanaan penilaian semula ganti rugi telah disahkan (lihat perenggan 55–57 & 60).]

Cases referred to

Beatrice Ramanathan & Anor v Shah Alam Properties Sdn Bhd & another case M [1994] MLJU 584; 99412 MLRH 782 (refd)

Eu Sim Chuan @ Eu Sam Yan & Anor v Kris Angsana Sdn Bhd [2007] 1 MLJ 734, HC (refd)

Inverugie Investments Ltd v Hackett [1995] 3 All ER 841, PC (refd)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] 2 CLJ 198, FC (refd)

Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708; [2016] 6 MLRA 65, CA (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2018] 3 MLRA 438, CA (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

Appeal from: *Chong Shao Fen & Anor v Mehrzad Nabavieh & Ors* [2019] 11 MLJ 556 (High Court, Kuala Lumpur)

Palanivel a/l KV Sathasivam (with Siow Chang Yao) (Palani Aishah & Co) for the appellant.

Chong Shao Fen (with Lai Siow Lien) (Syarikat Chan Chow Wang) for the respondent.

Lim Hock Leng JCA:

INTRODUCTION

[1] The respondents/plaintiffs' bungalow at 50 Jalan Taman Pantai, Kuala Lumpur, was damaged by demolition/construction works carried out by their neighbours in 2009.

[2] They sued their neighbours ('the first and second defendants') and their neighbours' architect, contractor, and consultant engineer ('the third, fourth and fifth defendants') for negligence.

[3] The litigation has a long and chequered history but the appeal before us is by the fifth defendant/appellant alone.

[4] The appeal is against the decision of the learned HCJ Nik Hasmat bt Nik Mohamad J on 1 November 2023. A

[5] The learned HCJ had allowed the plaintiffs' claim for reassessment of damages against the fifth defendant with costs of RM5,000 subject to payment of the allocatur fee, as follows: B

(a) loss of rental/loss of use of the bungalow — RM2,171,570;

(b) repair and rectification of the bungalow — RM1,171,012; and

(c) aggravated and/or exemplary damages — RM300,000 C

[6] The learned HCJ did not allow the claims for mental distress and hardship, and costs of moving back to the bungalow.

[7] The guiding principle in an appeal against a reassessment of damages is that there ought not to be any appellate intervention unless the court below has acted on a wrong principle of law, and the amount awarded is either so extremely high or low so as to make it an entirely erroneous assessment. See the decision of the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15. D E

[8] To appreciate the arguments concerning the loss of rental/loss of use of the bungalow, and apportionment of liability, it is necessary to set out a timeline of events. F

THE LITIGATION LEADING TO REASSESSMENT OF DAMAGES AGAINST THE FIFTH DEFENDANT

[9] The original trial judge held the first and second defendants 100% liable with damages to be assessed by the senior assistant registrar, while dismissing the claims against the third, fourth and fifth defendants, in 2013. G

[10] On 12 January 2015, the Court of Appeal set aside the High Court judgment. H

[11] The Court of Appeal made various orders and apportioned liability of 30% to the first and second defendants, 40% to the fourth defendant, and 30% to the fifth defendant. Only the third defendant was not found liable. An assessment of damages was ordered. It was subsequently heard by the deputy registrar. I

[12] On 2 February 2021, the deputy registrar dismissed the plaintiffs' claims entirely.

[13] On 23 June 2021, on appeal, Nazlan J (as he then was) allowed the claims for repair and rectification of the bungalow in the sum of RM1,171,012 and aggravated and/or exemplary damages in the sum of RM300,000, but not loss of rental/loss of use of the bungalow and their other claims.

[14] On 30 September 2021, the fifth defendant failed to set aside the assessment and judgment on the grounds of non-service of the writ and statement of claim, and that the legal firm Messrs Lin Coln & Co had never been appointed to act for him.

[15] Aggrieved by the dismissal of his application to set aside the judgment by the High Court, the fifth defendant appealed.

[16] On 8 November 2022, the Court of Appeal set aside the assessment by Nazlan J (as he then was) and ordered the reassessment to be heard before the High Court in respect of the fifth defendant. That was how the reassessment came before Nik Hasmat bt Nik Mohamad J on 1 November 2023 (by way of an appeal against the decision of the deputy registrar), and it is now the subject of the appeal before us.

[17] On 17 November 2022, separately, the appeals by the plaintiffs and the first and second defendants came before the Court of Appeal. The net result was that the first and second defendants had to pay the plaintiffs loss of rental/loss of use of the bungalow (RM2,171,570), repair and rectification of the bungalow (RM1,171,012) and aggravated and/or exemplary damages (RM300,000), with liability as apportioned earlier.

[18] So much for chronology which explains how the appeals concerning the first and second defendants on the one hand, and the fifth defendant on the other hand, came to be detached and separated.

[19] It has also been seen that the Court of Appeal had ordered the first and second defendants to pay certain amounts of damages under three heads of damages which are identical to what Nik Hasmat bt Nik Mohamad J, the learned HCJ, had ordered the fifth defendant to pay.

[20] There is no question of the principle of res judicata barring the fifth defendant/appellant from pursuing his appeal before us on account of the Court of Appeal's decision on 17 November 2022. The previous decision fastened liability on the first and second defendants. The fifth defendant was not a party in that appeal. The matter therein is not res judicata as against the fifth defendant.

[21] The fifth defendant's appeal can thus be heard on its merits.

DAMAGES FOR LOSS OF RENTAL/LOSS OF USE OF THE BUNGALOW (RM2,171,570)

[22] We will first deal with the damages for loss of rental/loss of use of the bungalow (RM2,171,570) which the learned HCJ had assessed against the fifth defendant/appellant here.

[23] In regard to the first head of damages, the appellant contended that the loss of rental or use of the bungalow are special damages which were not pleaded.

[24] Next, the appellant pointed out that it was the respondents' pleaded case that, due to the structural instability caused to their bungalow, they had moved out to the second respondent's Bukit Bandaraya apartment on 27 August 2009 till the bungalow could be made inhabitable vide para 18 of the statement of claim: 'Disebabkan ini, Plaintif-Plaintif menegaskan bahawa Plaintif Kedua telah hilangan sewa bulanan yang boleh dikutip untuk pangsapuri tersebut yangh (sic) berjumlah RM3,200.00 sebulan'. It was submitted that the plaintiffs were bound by their pleading that their loss of rental was for the apartment instead of the bungalow.

[25] In response, the respondents began by detailing the extensive damage to their bungalow including damage to water and sewage pipes, structural damage, as well as the impact on the integrity of the bungalow's foundation which were supported by the building survey report prepared by a building surveyor, Professor William Hamilton ('PW1'). In the building report, PW1 had expressed his view, inter alia, that the respondents and their family were fully justified in moving out of the bungalow in view of the proximity of a virtual vertical cliff of earth over 6 meters deep with growing erosion.

[26] Further, Ir Dr Gue See Sew ('PW3') had on 30 October 2009, advised the first plaintiff to move out of the bungalow for safety reasons.

[27] Furthermore, and most significantly, Sayed Hossein Khezri ('DW2'), the representative of the neighbours (the first and second defendants) had asked the first respondent to move out as he believed the respondents' bungalow was in danger of collapsing.

[28] There was no independent rebuttal report tendered by the appellant. Some seven weeks after the respondents moved out of the bungalow on 27 August 2009, the boundary wall collapsed.

[29] That said, and moving on from liability, the learned HCJ was not plainly wrong when she held:

> Despite not specifically pleaded in the plaintiffs' statement of claim, the plaintiffs' claim for loss of rental is allowed under general damages which does not require its specific pleading. The plaintiffs' rental loss following the loss of use of the bungalow is clearly not special damages but instead constitutes general damages which cannot be pleaded in the statement of claim.

[30] The loss of rental was used as a yardstick for the respondents' loss of use of their bungalow from the time they moved out on 27 August 2009 till May 2020, based on the report and valuation of Deb Brata Das Gupta ('PW3'), a chartered surveyor and registered valuer with about four decades of working experience.

[31] In cases where a plaintiff has been wrongfully deprived of the use of property, the measure of damages would be actual proof of the loss of rental or a genuine reasonable estimate of the rental that the property might have fetched but for the wrongful action. See the advice of the judicial committee of the Privy Council in *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841.

[32] As there was no actual rental paid, a notional rental had to be determined which would, as closely as possible, reflect the loss of use of the bungalow. Towards that end, a variety of rental values was adduced (ranging from RM10,000 to RM18,000 per month in the Taman Bukit Pantai area).

[33] With that in mind, the damages were correctly classified as general damages.

[34] The appellant's reliance on *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198 is misconceived. In that case, the Federal Court held that:

> the exact loss must be pleaded where the precise amount of item of damages has become clear before the trial either because it has already occurred and so become crystallised, or because it can be measured with complete accuracy.

[35] On the facts of the present dispute, the claim for loss of rental/loss of use of the bungalow could not have been ascertained with certainty.

[36] The respondents, when the statement of claim was prepared, could not have pleaded losses which had yet to be incurred with mathematical precision, more so when the head of claim was over a certain time within the period 27 August 2009 till May 2020 when there were fluctuations. And, notably, a large part of the relevant period was after the filing of the action in 2011. As

such, the loss and damages relating to the loss of use of the bungalow was such that 'the precise amount of item of damages' could not have become clear before the trial. Such loss and damage could not be classified as special damages.

[37] Indeed, it was Chew Sok Kwee ('DW2') who gave evidence that the typical monthly rental in the same neighbourhood 'would be in the region of RM7,000 to RM18,000 ranging from condominium unit to bungalow', before acknowledging under cross-examination that the market rental of the subject bungalow is in the region of RM18,000 per month.

[38] It was thus the quantum of damages for loss of rental/loss of use in the sum of RM2,171,570 (with some variables) was assessed against the fifth defendant who would be accountable for 30% of the sum as per the apportionment of liability.

[39] In respect of any prejudice that may accrue to the appellant on account of the respondents' pleaded case, it is significant that the respondents had abandoned their claim for loss of rental for the apartment in Bandar Bukitraya and adduced no evidence relating to that head of claim. There is thus no issue of overlapping claims.

[40] The respondents were hence entitled to pursue their claim in general damages as averred in prayer (h), having pleaded that they had to move out of their bungalow for safety reasons and 'Rumah Plaintif-Plaintif kini tidak sesuai langsung untuk dihuni kerana struktur adalah diragui'.

[41] Further, the appellant could not be said to be prejudiced or to have been taken by surprise, given the witness statements and reports made available before the trial/assessment/reassessment.

[42] We find no merit in the appellant's contention that the learned HCJ could not assess and award damages for loss of rental/use of the bungalow. The appellant referred to the High Court's decision in *Beatrice Ramanathan & Anor v Shah Alam Properties Sdn Bhd & another case M* [1994] MLJU 584; 99412 MLRH 782 where it was held:

> ... the general object underlying the rules for the assessment of damages in the case of a tort causing damage to real property, the court is required to apply one or the other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement Which measure is appropriate will depend on a number of factors. Be that as it may the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on to the

property merely for investment purposes. On the other hand if the plaintiff intends to continue to occupy it and to repair the damage the proper measure is clearly the cost of all such repairs.

[43] In that case, the plaintiff in question was at all material times in occupation of the subject property which had been damaged by the defendant's torts. She had been paid RM42,000 by way of a consent order and also sought assessment of damages for her property's 'devaluation'. The ratio in that case was that she could not claim for both heads of damages.

[44] Here, the bungalow had become uninhabitable. It was no longer safe to stay there. The respondents in the instant case were not in a position to elect between the option of occupying the bungalow while carrying out repair and rectification works, or selling the bungalow and claiming the diminution in value since it was unsafe for inhabitation. There is no failure to mitigate as the tortfeasors failed to carry out the works ordered by the original trial judge.

[45] The material facts in *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708; [2016] 6 MLRA 65, a decision of the Court of Appeal which the appellant cited, are markedly different. In that case, there was no loss as the land in its entirety had increased in value. There was no direct evidence of the costs of repairs and also no evidence of what would be a fair rental that the plaintiff could have expected from the land.

REPAIR AND RECTIFICATION COSTS FOR THE BUNGALOW (RM1,171,012)

[46] The thrust of the appellant's contention regarding this head of claim is that:

since the reliefs sought by the respondents in respect of the repair and rectification works were granted by the learned trial judge and subsequently the said remedial works had already been duly carried out based on Dr Gue's recommendations, no further claim for the same repair and rectification works should be allowed as that would result in double claim.

[47] A perusal of the grounds of judgment of the learned HCJ and Nazlan J (as he then was) will show that the basis of the claims was justified and there are no overlapping or double claims.

[48] The learned HCJ observed that the fifth defendant had waived his right to challenge the oral testimony of PW2 and PW3 when he failed to attend the proceedings though served with the notice for assessment of damages. Her Ladyship noted the supporting evidence for the repair and rectification works, in particular, the written and oral evidence of PW1 who during trial

recommended rectification and repair on the plaintiffs' bungalow, PW3's valuation report, and exh P6 (the quotation for repair costs).

[49] Nazlan J (as he then was) was of the view that there was 'no paucity of evidence in respect of the claim for the costs of repair and rectification of the plaintiffs' property. Ir Dr Gue See Sew ('PW1') had given evidence as to the damages to the property that necessitated works and had produced his geotechnical inspection report dated January 2020 and the earlier preliminary geotechnical report dated June 2010'.

[50] His Lordship went on to hold:

> Yap Tin Soon ('PW2'), a contractor, gave evidence and submitted his estimated costs of repair and rectification and who had taken 48 photographs showing the damage to the plaintiffs' property as well as his reliance on the building survey report dated December 2010 prepared by Prof Hamilton and the accompanying notes of evidence at the liability proceedings. PW2 in his evidence confirmed that his quotation involved in respect only of repairing and rectifying the affected and damaged sections of the property, specifically of the bungalow, the garden compound and building of a new common boundary wall at the total cost of RM1,171,012.

[51] Subsequent to the collapse of the common boundary wall and the garden compound in 2009, the fourth defendant built a retaining wall and another layer had to be added. It was found to be ineptly done by PW1. The fourth defendant had rebuilt the common boundary wall which was also found to be unsatisfactory.

[52] A perusal of the geotechnical inspection report prepared by Ir Dr Gue See Sew ('PW3') in January 2020 shows that, moving forward, there are repair and rectification works which have yet to be carried out, such as the repair of all cracks in the boundary wall, staircase wall and above the stormwater outlet; the reinstatement of the reinforced concrete slab between the lower and upper staircase; and the reinstatement of the lower staircase with proper compaction of the soil. On top of that, the drainage and sewerage system have to be checked and repaired to prevent leakage from undermining the adjacent foundation of the bungalow. It is clear from the evidence that the cause of the problems is due the negligence of the respondents, and not due to the pre-existing lack of maintenance of the bungalow.

[53] There was no double claim, and the learned HCJ cannot be said to have been plainly wrong in assessing repair and rectification works in the sum of RM1,171,012 which was amply supported by evidence.

AGGRAVATED/EXEMPLARY DAMAGES (RM300,000)

[54] Prior to the collapse of the common boundary wall, the respondents could have put sheet piles in place adjacent as a preventive measure, more so as cracks had appeared in the wall of the bungalow as early as the middle of 2009, about three months before the collapse. They did not do so.

[55] As noted by the learned HCJ, during that three-month period:

> no step was taken by the defendants to prevent the collapse of the boundary wall, not even the piling of sheet piles on the wall.

[56] Aggravated/exemplary damages of RM300,000 were thus awarded on account of the reckless and gross negligence of the appellants who did not put up with the extra costs at the expense of the respondents, and for the overall conduct of the appellants.

[57] The quantum is justified and not manifestly excessive such that appellate intervention is warranted. Reference may be made to *Eu Sim Chuan @ Eu Sam Yan & Anor v Kris Angsana Sdn Bhd* [2007] 1 MLJ 734 where Azmel Maamor J, in awarding aggravated/exemplary damages of RM500,000, held:

> On the facts of this case it is quite obvious that the cause of damage to the plaintiff's property was due to the excavation works carried out by the defendant at the site adjacent to the plaintiffs' bungalow. And the damage began to appear during the excavation works carried out by the defendant. The matter could have been easily settled if at that time the defendant were to admit liability and agree to do the necessary repair and ratification works as well as necessary preventive measures. The defendant refused to admit that they were liable for its action. Instead the defendant preferred to wait for the plaintiff to bring court action knowing that this would take years to complete. The longer the delay the more advantageous would it be to the defendant. As for the plaintiffs, the longer the delay the more painful would be their sufferings. This is how the defendant in this case actually behaved, in addition to that having considered the proximity of the plaintiff's property to the excavation site, adequate tests and precautionary measures should have been taken by the defendant to ensure that the foundation of the plaintiff's property would not be affected by their excavation activities. The defendant should have determined the type of foundation on which the plaintiff's house was constructed vis a vis the nature of the soil found there, and then to take appropriate steps to ensure that the plaintiff's property would not be damaged. No such tests or any preventive measures were carried out by the defendant on the plaintiff's property. Any reasonable person, more so a developer of the defendant's standing, would have foreseen the consequence of the excavation works on the plaintiff's property. This clearly indicates couldn't care less attitude of the defendant which is most uncalled for. The sole concern of the defendant was to quickly complete the construction and reap as much benefits with the minimum amount of costs incurred. It is a very selfish attitude most undesirable in a community we Malaysians are used to. The

behaviour and attitude of developers towards their neighbours have been so degrading that appropriate authorities should take necessary steps to check their activities to ensure that their neighbours are not adversely affected. In the light of such behaviour and attitude of the defendant towards the plaintiff, I allow the claim for aggravated and/or exemplary damages against the defendant in the sum of RM500,000.

[58] Notably, the Court of Appeal upheld the award of aggravated/exemplary damages in that case. As highlighted by the Court of Appeal, not unlike the case at hand:

The respondents had given the appellant very early warnings as regards the extent of the damages pursuant to its activities but to no avail. No serious preventive measures were undertaken and the sufferings of the respondents merely multiplied.

[59] There was contumelious disregard for the respondents' rights which justify either or both the aggravated/exemplary damages awarded as a whole here (see *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2018] 3 MLRA 438).

CONCLUSION

[60] In the upshot, we unanimously dismiss the appeal with costs of RM20,000 subject to payment of the allocatur fee. The decision and awards of damages by the learned HCJ in the reassessment of damages exercise are hereby affirmed.

Appeal dismissed with costs.

Reported by K Selvaraju